



Centrum Stosunków Międzynarodowych
Center for International Relations

Reports & Analyses

10/04/A

Antoni Podolski

**The Hague programme (Internal Security and
Justice in the period 2005-2009):
the Polish perspective**

The report was created in cooperation with the Konrad Adenauer Foundation.

CENTER FOR INTERNATIONAL RELATIONS

ul. Emilii Plater 25, 00-688 Warszawa
TEL.: (22) 646 52 67, FAX: (22) 646 52 58
www.csm.org.pl, info@csm.org.pl

The Hague programme (Internal Security and Justice in the period 2005-2009): the Polish perspective

A tragedy of a few hundreds of European victims of terrorism, especially those who fell 11 March 2004 in Madrid as well as those in Istanbul and African resorts, might have a crucial impact on creating a coherent and effective European security system. The attacks in Madrid in particular stimulated a lively discussion about the European justice and home affairs policy (JHA), co-operation or even integration of police and intelligence services¹. Internal security became one of the priorities of the Netherlands' Presidency.

Therefore, it seemed quite natural that the then counter-terrorism context affected the last phase of evaluation of the former programme introducing JHA policy (the Tampere I programme) and the development of the new one – the Hague programme (called also Tampere II). The Tampere I programme was thought to create the Area of Freedom, Security and Justice (AFSJ). Poland's participation in the programme was limited for the formal reason (no membership) and proceeded only in a conforming, passive way. Besides, Poland was not included within as essential part of (AFSJ) as Schengen, due to weak preparation on its side and delays on the Union's side.

Over-ambitious goals of the Tampere programme

It has to be admitted, that the Tampere programme – with not all the original aims achieved² – actually consisted of two phases, the first one rather passive and sluggish (before September 2001) and the second one more active (after Al-Kaida attacks in September 2001 and Madrid attacks in March 2004). The Tampere agenda was very ambitious, probably too ambitious, as it had not been completed despite

¹ For more information on this issue, see: Antoni Podolski – “Bezpieczeństwo europejskie po Madrycie z polskiej perspektywy” [The European security after Madrid events: the Polish perspective], CSM 2004.

² Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”,

favorable political environment, notably since the late 2001. The favorable conditions already existed earlier and were generated by the old EU countries' public fears of the increasing crime threat (due to the enlargement³) and a rising influx of immigrants from Asia and Africa. However, the credit for the European integration in terms of internal security and justice goes to Islamic terrorists. Their attacks in the U.S. in September 2001 and in Madrid in March 2004 had a great impact on accelerating the execution of the Tampere and other security initiatives.

The first two years of the Tampere programme execution (until the late 2001) can be described as a rather theoretical implementation, but a clear legislative and organizational acceleration could be noted right after 11 September 2001. In 2001-2004, the European framework for combating organized crime and terrorism was established (European Arrest Warrant⁴, the European list of terrorist groups, the European terrorism definition⁵, setting up joint investigation teams⁶, establishing Eurojust, a European prosecution agency, implementing specific measures for police and judicial cooperation⁷, establishing the European Agency for the Management of Operational Cooperation at the External Borders⁸, including special services within the current cooperation of police forces⁹, combating money laundering¹⁰, execution of orders of freezing property or evidence¹¹). However, none of the Framework Decisions had been adopted in each member state before the attacks in Madrid in March 2004¹².

Brussels, 2.6.2004.

³ More on that: Joerg Monar – “The Area of Freedom, Security and Justice After the 11th September: Problems of Balance and Challenge of Power”; EU 2002 Organized Crime Report.

⁴ Council Framework Decision of 13 June 2002 relative on the European Arrest Warrant and surrender procedures between the Member States, JO L 190 of 18.7.2002.

⁵ Council Framework Decision of 13 June 2002 on the fight against terrorism, JO L 164 of 22.6.2002.

⁶ Council Framework Decision of 13 June 2002 on joint investigation teams, JO L 162 of 20.6.2002, p. 1.

⁷ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, JO L 63 of 6.3.2002, p. 1; Council Decision of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP.

⁸ The Commission Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders, 11.11.2003.

⁹ Council Decision of 28 November 2003 Council Decision of 28 February 2002.

¹⁰ Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, JO L 182 of 5.7.2001, p. 1.

¹¹ Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, JO L 196 of 2.8.2003, p. 45.

¹² Commission Press Room – MEMO04/63 – “Existing legislative instruments relevant to the fight

After the Madrid shock, the European Council urged “all Member States to take any measures that remain necessary to implement fully and without delay the (...) legislative measures.”¹³ Again, the issue of insufficient exchange of information between law enforcement authorities of member states as well as between their authorities and the EU bodies (Europol, Eurojust) and their jurisdiction was discussed¹⁴. The hope arose to create the European-level internal security system, in both the legislative and, the more difficult, organizational sphere.

Ambitions of the Tampere II programme vs. realism of the Hague programme

The after-Madrid acceleration of integrating security actions found expression in the European Commission mid-2004 proposals to be included in the AFSJ action-plan for the next five years, at the time referred to as the Tampere II programme. The proposals included, among other things, increasing Europol and Eurojust jurisdiction, creating legislative frameworks in order to improve information exchange between the member states' services and building a coherent criminal justice policy¹⁵. According to the Commission's ambitions, Europol should be transformed into the EU's police¹⁶ as well as Eurojust, planned to become a European public prosecutor's

against terrorism, and draft measures already on the Council table”.

¹³ Short deadlines were even set to eliminate negligence in Europol, Eurojust and Police Chiefs' Task Force performance. The Council also pointed out the delaying progress in implementing the second generation Schengen Information System (SIS II), setting specific deadlines for the appropriate regulations and decisions to come into force (by June 2004) and for deciding over its location, management and financing (by May 2004). The Commission is obliged to submit proposals for enhanced interoperability between European databases and to explore the creation of synergies between existing and future information systems (SIS II, VIS and EURODAC), which clearly shows there are still obstacles to encounter in this matter. Apart from delays in bringing the EU's decisions into effect, reluctance to share intelligence and police information related to national sovereignty is another weakness of the developed European security system. - The European Council Declaration on Combating Terrorism, 25.03.2004; Antonio Vittorino, the European Commissioner for justice and home affairs – IP/04/425.

¹⁴ Communication from the European Commission, 30.03.2004 – IP/04/425.

¹⁵ Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004.

¹⁶ “It seems indispensable (...) to give thought to the legal framework of Europol, to make it truly operational and convert it into a Union agency, financed from the Community budget.” - Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004, p. 14.

office¹⁷. Pressing issues raised by the EU enlargement resulted in placing emphasis on the strengthening external borders and “the preparation of the new Member States for full accession to the Schengen *acquis*.”¹⁸ Prospective removal of all internal border checks (i.e. the admission of new members to Schengen), included in the draft Commission’s proposal, was seen as introducing “an integrated external border management system”, with the long-term objective of establishing a European Corps of border guards¹⁹. Solutions concerning asylum system and immigration policy of member states would be integrated in the similar way²⁰.

It has to be stressed that the final version of the Commission’s proposal (June 2004) reflected the after-Madrid pro-integration climate, even with some states suggesting establishing a European Intelligence Agency²¹. However, six months after the Madrid attack, with fortunately no more victims of terrorism and a difficult compromise over the constitution, the pro-integration enthusiasm decreased substantially, particularly with regard to giving more jurisdiction to the existing EU bodies or even setting up new ones. National issues got on the rise. Projects of new EU institutions were replaced with the ideas of reinforced cooperation between the individual states’ institutions and setting up or strengthening various joint investigation teams (e.g. Police Chiefs’ Task Force as an alternative to Europol). This tendency could be easily observed when a position of a Counter-Terrorism Coordinator was established within the European Council’s framework, with its Secretary-General / High Representative for the Common Foreign and Security Policy, Mr. Javier Solana, instead of extending Europol jurisdiction. The Coordinator, Mr. Gijs de Vries, is supported by the delegated officers of the national services, acting as the EU’s military Situation

¹⁷ “A European Public Prosecutor’s Office with specific responsibility for offences to the detriment of the Union’s financial interests, should be able to be created from Eurojust.” - Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004, p. 13.

¹⁸ Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004, p. 7.

¹⁹ “The development of coordination mechanisms must be strengthened and supplemented with the long-term objective of establishing a European Corps of border guards to complement the national border guards.” - Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004, p. 9.

²⁰ Communication from the commission to the council and the European parliament – “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, Brussels, 02.06.2004, pp. 9-10.

²¹ For more information on this issue, see: Antoni Podolski - “Europejska Współpraca Wywiadowcza –

Centre (SitCen), whereas, for instance, some smaller member states, including Austria and Greece, suggested establishing a new European Intelligence Agency²².

It is therefore no surprise that after a nearly half-a-year discussion, concerning, among other things, further development of the AFSJ, instead of the Commission's courageous action-plan, the November European Council enacted the programme, referred to as the Hague programme, being clearly less-ambitious or even cautious and over-realistic, based on inter-governmental negotiations²³. The concept of "inter-governmental" way of organizing actions and information exchange, as regards the EU internal security, has definitely won. There will be no new, independent European police or intelligence institutions; only the cooperation and information exchange between the member states' services should develop. The role of the EU institutions will limit to facilitating or acting as an agent of the cooperation; they will not be entitled to take any independent actions nor stand in for police or judicial institutions of the member states. No European Border Guard will be set up as well as no EU's police or judicial agencies will be formed out of the existing Europol or Eurojust. Moreover, it is stressed that the control and surveillance of external borders fall within the sphere of national border authorities, at least until the end of 2007. Then, the Commission will assess the performance of the already established European Agency for the Management of Operational Cooperation at the External Borders²⁴. This assessment should include the viability study of introducing a European Border Guard System. Thus, the idea to establish an independent EU's border guard has been abandoned in favor of the system of cooperation between national border guards²⁵. Similarly, the role of Europol is to secure information exchange and threat analysis for national police services and more operational force will be given to the Police Chiefs' Task Force²⁶. The "inter-governmental" way of cooperation is also reflected in a proposal to establish an Internal Security Committee²⁷ within the

brakujące ogniwo CFSP?" [European Intelligence Cooperation - a missing cell of CFSP?], CSM, 2004.

²² For more information on this issue, see: Antoni Podolski - "Europejska Współpraca Wywiadowcza – brakujące ogniwo CFSP?" [European Intelligence Cooperation - a missing cell of CFSP?], CSM, 2004.

²³ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" - Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I.

²⁴ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" - Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I, p. 17.

²⁵ Consistent with the Seville European Council Action Plan (14 June 2002).

²⁶ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" - Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I, p. 23.

²⁷ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" -

European Council as well as to increase the role of the Situation Centre (SitCen), acting also within the framework of the European Council and the Secretariat-General, in the field of threat analysis based on police and intelligence services of the member states²⁸.

It seems that, under the current political circumstances of the divided Europe, the possible maximum level of integration in terms of internal security and justice depends on the will to develop the EU's legislation in this matter, particularly standardizing criminal law and mutual recognition of judicial decisions issued by law enforcement authorities (especially, arrest warrants).

Poland in between Tampere and Schengen

What was the Polish reaction to those political processes and tendencies, particularly to the European Commission's proposal? Should the definitive shape of the Hague programme be seen as Poland's success or failure?

Before we start discussing Poland's stance, we should try to describe the general circumstances affecting the Polish assessment of both the Tampere programme and its continuation. Some limited trust that the Central and Eastern European candidate states were exposed to, has already been mentioned. The enlargement was feared to increase the threat of organized and minor crime wave, moving from the East towards the West across the alleged leaky borders of the new member states and their corrupted and inefficient police and judicial systems²⁹. However, it has to be reminded that the kind of discipline that characterized the states heading towards the EU accession resulted in Poland's being, for instance, much more advanced than the old EU members in terms of implementing the Framework Decisions, including the European Arrest Warrant³⁰, the Joint Investigation Teams³¹ and combating

Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I, p. 24.

²⁸ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" - Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I, p. 21.

²⁹ Joerg Monar, op. cit.

³⁰ Council Framework Decision of 13 June 2002 relative on the European Arrest Warrant and surrender procedures between the Member States, JO L 190 of 18.7.2002, implemented within the Polish legislative framework by means of Article 2/2 of the Act of 16 April 2004 introducing changes to

terrorism³². In other words, our Eastern border security does not seem to be less effective than that of the old member states.

However, despite the huge organizational effort, the EU's cautious approach to the new members resulted in postponing their admission to Schengen, under the pretence of modernizing the Schengen Information System³³. Some formal obstacles to accessing classified information were another pretence to limit the new members' access to information³⁴. Under such circumstances, it became clear that the date of the Schengen enlargement is linked with the date of establishing the European borders management.

Poland and the Hague programme

The Polish stance could be therefore expected to support the items on the Hague agenda that would bring the Schengen enlargement nearer, decrease the cost of the Eastern border and visa management as well as the potential influx of refugees. As it was the case, Poland demanded the Union to "advance the start of the new member states' assessment with regard to their accession to Schengen" in order to enlarge it in 2007³⁵, i.e. right after introducing the second generation Schengen Information System (SIS II). The Polish stance assumed "emphasizing [in the Hague programme – note by the Author] the principle of solidarity of the member states in the field of border protection, resulting in the Community financial support for the external border

Criminal Code and some other acts.

³¹ Council Framework Decision of 13 June 2002 on joint investigation teams, JO L 162 of 20.6.2002, implemented within the Polish legislative framework by means of Article 2.2 of the Act of 16 April 2004 introducing changes to Criminal Code and some other acts.

³² Council Framework Decision of 13 June 2002 on the fight against terrorism, JO L 164 of 22.6.2002, implemented within the Polish legislative framework by means of Article 2/2 of the Act of 16 April 2004 introducing changes to Criminal Code and some other acts.

³³ Although the Treaty of Amsterdam integrated the Schengen *acquis* into the framework of the *acquis communautaire*, in fact, in accordance with the Commission's decisions, some regulations (most of the Convention's articles, including visa policy) were intended to come into force by the date of a new member's accession, whereas some of them were only indispensable for a member state's full participation in Schengen, with a view to removing all internal border checks (final assessment of border security and capability to introduce the Schengen Information System) - The European Commission press releases: Schengen and Enlargement (July 2001), List of provisions of the Schengen *acquis* (August 2001).

³⁴ Joerg Monar, op. cit.

³⁵ Statement of the Minister of Interior and Administration, Mr. Ryszard Kalisz - Press Office of the Ministry of Interior and Administration, 26.10.04.

management”, with an appropriate funding in the EU’s 2007-2013 budget³⁶.

What is striking in Poland’s position³⁷ is a lack of any initiative intended to create common European legislation pertaining to internal security, especially no support for establishing EU’s internal security institutions or extending competence of the already existing bodies (like Europol). Evidently, a predominant view, and one that has been quite popular in Poland lately, is that the internal security should remain the prerogative of member states³⁸. Instead, Poland suggested emphasizing “specific actions developing the area of freedom, security and justice.”³⁹

The Polish position also lacks any support for the Commission’s idea to establish or develop the Community’s JHA agencies. It fails to back the idea of extending competence of Europol⁴⁰ and Eurojust and, moreover, it expresses a negative attitude towards the idea of establishing a European Corps of border guards⁴¹ or a European Asylum Office (EAO)⁴².

Conclusions

If we compare the Polish stance to the final version of the Hague programme we might find the latter to be a formal success of the Ministry of Interior and

³⁶ “Poland’s stance on the Hague programme, concerning home affairs” – a document issued by the spokesperson for the Ministry of Interior and Administration on the Author’s request 5 November 2004.

³⁷ *Ib.*

³⁸ Unofficially, the opposition against establishing new common bodies or extending competence of the already existing ones results from reluctance to any bureaucratic initiatives, producing even more complex and probably ineffective administration structures, as was explained to the Author.

³⁹ The Author’s inquiries in the Ministry of Interior and Administration show that the Ministry’s officials understand these actions as, among other things, operational cooperation of the police, judicial or even intelligence services.

⁴⁰ It is worth reminding that Poland was among the last new member states that entered Europol (1 November 2004) and, at the time of formulating its stance, it acted only as an associate member – through its own fault. Shortly after accession seven countries entered Europol: Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Hungary and Cyprus. In November, only Poland, Malta and Estonia remained outside the organization, due to delays in document preparation and submission.

⁴¹ “Poland’s stance on the Hague programme, concerning home affairs” – a document issued by the spokesperson for the Ministry of Interior and Administration on the Author’s request 5 November 2004. The Minister of Interior and Administration, Mr. Ryszard Kalisz, told the media that: “No common border guard need be established. The Polish border is to be guarded by the [National] Border Guard.” – Press Office of the Ministry of Interior and Administration, 26.10.2004.

⁴² “Poland’s stance on the Hague programme, concerning home affairs” – a document issued by the spokesperson for the Ministry of Interior and Administration on the Author’s request 5 November 2004.

Administration as well as the Ministry of Justice, particularly in terms of emphasizing the need to enlarge Schengen promptly and to start the appropriate candidate states' assessment as soon as in the first half of 2006⁴³. Torpedoing the idea of establishing a European Corps of border guards might seem another success. However, the issue of financing the national border guards by means of the principle of solidarity fails to be a total success. In fact, the Hague programme does not mention specific ways of financing border guards. Instead, what it includes is only a general emphasizing of the principle of solidarity and burden-sharing between the member states, including financial burdens of border guard management⁴⁴. Does the final version of the Hague agenda really meet all the Polish needs?

Regardless of any doubts, whether Poland should remain skeptic towards developing European legislation with establishing European internal security and justice institutions as a consequence, a number of questions, concerning logic and practice, still need to be resolved.

1. Firstly, as there is essential evidence, both in many EU's documents on JHA and in practice as well, of putting emphasis on creating common European legislative frameworks in this matter⁴⁵, would it not be advisable for the new member state, seen as a provider of criminal threat on the one side and as an importer of terrorist threat on the other, to be more active in supporting European integration in the matter or even suggest new solutions?

2. Secondly, does the condition of the Polish police and special services really encourages their counterparts of other European states to a complete and direct operational cooperation⁴⁶? Would it not be wise for Poland to be a strong supporter of establishing European bodies acting as agencies for organizing or even forcing the operational cooperation?

⁴³ "The Hague Programme. Strengthening Freedom, Security and Justice in the European Union" - Presidency Conclusions, Brussels, 4/5 November 2004, 14292/04, Annex I, p. 17

⁴⁴ *Ib.*

⁴⁵ For instance, the European terrorism definition, combating money laundering, mutual recognition of arrest and evidence warrants, etc.

⁴⁶ For instance, in March 2004, the Polish intelligence service was refused participation in a council of the five leading Union's intelligence services. Some Western European politicians found it an

3. Is it not Poland's best interest, in the face of organized crime and contemporary terrorism, to extend the competence of Europol⁴⁷ or Eurojust?

4. Lastly, is it not too optimistic to assume that all member states will equally share the costs of protecting the Eastern border, relying on the Polish organizational and staff resources?

opportunity to make malicious comments.

⁴⁷ Particularly, Article 2 of the Europol Convention limits Europol's competence to combating serious crimes affecting more than one Member State. Poland's interest would be to extend this body's jurisdiction also over cases involving only one Member State if crime originates outside the EU. In the current Polish situation, criminal threat may have its roots in the former Soviet Union's territory, Iraq or Afghanistan.

Center for International Relations

WHO WE ARE?

The Center for International Relations (CIR) is an independent, non-governmental establishment dedicated to the study of Polish foreign policy as well as those international political issues, which are of crucial importance to Poland. The Center's primary objective is to offer political counselling, to describe Poland's current international situation, and to continuously monitor the government's foreign policy moves. The CIR prepares reports and analyses, holds conferences and seminars, publishes books and articles, carries out research projects and supports working groups. Over the last few years, we have succeeded in attracting a number of experts, who today cooperate with the CIR on a regular basis. Also, we have built up a forum for foreign policy debate for politicians, MPs, civil servants, local government officials, journalists, academics, students and representatives of other NGOs. The CIR is strongly convinced that, given the foreign policy challenges Poland is facing today, it ought to support public debates on international issues in Poland.

The founder and president of the Center for International Relations is Mr Janusz Reiter.

OUR ADDRESS:

UL . Emilii Plater 25, 00-688 WARSZAWA
tel. (0048-22) 646 52 67, 646 52 68, 629 38 98
fax (0048-22) 646 52 58
e-mail: info@csm.org.pl
You are welcome to visit our website:
www.csm.org.pl

OUR SPONSORS:

- The Ford Foundation
- The Stefan Batory Foundation
- The Konrad Adenauer Foundation, Poland
- German Marshall Fund of the United States
- Robert Bosch Stiftung
- The Foundation for Polish-German Cooperation
- Haniel Stiftung
- PAUCI

A number of projects implemented by the Center have been sponsored by the Ministry of Foreign Affairs of the Republic of Poland and Ministry of Defence.

The Reports and Analyses of the Center for International Relations are available on-line at the CIR website: www.csm.org.pl